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CONTRACT'S "MANY FUTURES" AFTER DEATH; UNANSWERED QUESTIONS OF SCOPE AND PURPOSE

KURT A. STRASSER*

I. INTRODUCTION

Traditional contract is under attack. Professor Grant Gilmore informs us that contract is dead¹ and, more recently, Professor Ian Macneil and others argue that traditional doctrine does not reach much of the commercial exchange conduct for which it was intended.² These attacks are disturbing in view of the apparent doctrinal stability of fundamental contract concepts since the early twentieth century and the warm reception given both Restatements. In an attempt to evaluate the ongoing commentary on traditional contract law, this Article will examine these attacks and the jurisprudential assumptions upon which they are based.

Traditional contract doctrine is based on the fundamental concept that the doctrine of consideration separates those promises that will be enforced from those that will not be.³ The central idea underlying consideration is that enforcement should be granted only those promises that are given in exchange for other promises or conduct.⁴ This formulation has been criticized recently for not articulating the reasons for its enforcement of some promises,⁵ for being the exclusive ground for promise enforcement instead of simply one ground,⁶ and for other

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1. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

2. E.g., Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

3. See A. CORBIN, *CORBIN ON CONTRACTS* § 110 (1963); Brody, *An Exercise in Sociological Jurisprudence: Herein the Signal Theory*, 20 DE PAUL L. REV. 791, 801 (1971); see generally P. ATIYAH, *CONSIDERATION IN CONTRACTS, A FUNDAMENTAL RESTATEMENT* (1971); Fridman, *The Basis of Contractual Obligation, an Essay in Speculative Jurisprudence*, 7 LOY. L.A.L. REV. 1 (1974).

4. See *RESTATEMENT (FIRST) OF CONTRACTS* § 75 and Comment a (1932).

5. See Brody, *supra* note 3, at 793-94.

6. See Ellinghaus, *Consideration Reconsidered Considered*, 10 MELB. L. REV. 267,

reasons.⁷ Several commentators recently have proposed reform or total abolition of the consideration requirement.⁸ Yet, despite the present flurry of academic discussion, no serious attempt to overthrow completely the present doctrine appears to be brewing.

Although there is no wholesale revolution in progress, a substantial fifth column action has been mounted against bargained-for exchange as the exclusive basis for enforcing promises.⁹ Thus, in addition to bargained-for exchange, justifiable reliance on a promise is now considered to be an adequate basis for enforcement of that promise.¹⁰ The doctrine of promissory estoppel has been used to supplement traditional bargained-for exchange, in effect adding another category of promises for which legal enforcement will be granted. Similarly, a promise now may be enforced when failure to do so would result in unjust enrichment—a category frequently labeled quasi-contract or promissory restitution.¹¹

273 (1975).

7. See, e.g., A. CORBIN, *supra* note 3, § 111. For a discussion of the history of some of the present problems of consideration, see Barton, *Early History of Consideration*, 85 LAW Q. REV. 372 (1969); Brody, *supra* note 3, at 857-58.

8. See, e.g., Brody, *supra* note 3, at 855 (presenting author's signal theory); Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis*, 17 INT'L & COMP. L.Q. 137, 158-64 (1968) (recommending, *inter alia*, changing the English rule to enforce any "serious" promise); Ellinghaus, *supra* note 6, at 283-84 (recommending changing the rule generally to enforce all promises); Fridman, *supra* note 3, at 5-8 (recommending changing the rule to enforce those promises which manifest the parties' intention to be bound); Treitel, *Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement*, 50 AUSTRAL. L.J. 439, 449 (1976) (recommending codification of the presently recognized exceptions). For a generally supportive discussion of the reasons for the doctrine, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958).

9. See Ellinghaus, *supra* note 6, at 272-74 (noting that the exclusive formulation of bargained-for exchange as the basis for enforcement of promises seems to be the primary problem with consideration as presently formulated).

10. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft Nos. 1-7, 1973). To enforce a promise on the theory of promissory estoppel, courts usually impose four requirements: a promissory obligation; definite, substantial and foreseeable reliance; reliance induced by the promise; and no alternative for avoiding injustice. *Id.* See A. CORBIN, *supra* note 3, § 206; S. WILLISTON, A TREATISE ON THE LAW OF CONTRACT, §§ 139-40 (3d ed. 1957); Note, *Promissory Estoppel—Measure of Damages*, 13 VAND. L. REV. 705, 705-07 (1960). In England it appears that justifiable reliance on a promise is a defense against imposition of liability, but is not a sufficient basis for imposing liability. See Fridman, *supra* note 3, at 12-15.

11. For specific applications of this general idea, see RESTATEMENT (SECOND) OF CONTRACTS §§ 85-89 (Tent. Draft Nos. 1-7, 1973); A. CORBIN, *supra* note 3, §§ 19, 234. For a

Thus, the courts have relaxed the requirement of traditional bargained-for exchange, but have not engaged in a full, frontal assault on the doctrine. Yet, concludes Professor Gilmore, the exceptions have so eroded the rule that a frontal assault is no longer necessary.¹² His thesis is that classical contract theory, originally an ivory tower construct of Langdell, Holmes, and Williston, has disappeared as an effective dispute resolver. The three central tenets of this theory have been eroded away to nothing: (1) limited liability based upon classic consideration has been exploded by promissory estoppel and quasi-contract;¹³ (2) the absolute character of this liability has been weakened seriously by doctrines such as frustration, mistake, and impossibility, which excuse nonperformance of the breaching party; and (3) the limited damages available under the classic system have been expanded greatly by punitive damage awards. From this erosion, Professor Gilmore concludes that contract is returning to the general civil liability tort classification from which it came.¹⁴

Professor Macneil, on the other hand, focuses not on the actions of courts and restaters, but on those of most commercial contract makers.¹⁵ Following a school of thought which focuses on empirical study of the behavior of commercial parties engaging in bargaining and exchange,¹⁶ he argues that contract law simply does not regulate much of the commercial behavior it should and does not regulate properly that which it does. He argues that, while most exchanges involve parties motivated by concerns about continuing commercial relations as well as concerns about specific commercial transactions, contract law assumes that only commercial transactions are relevant influences and subjects for discussion. Thus, in his view, contract law

more extensive treatment of the subject of restitution generally, see Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966).

12. G. GILMORE, *supra* note 1, at 87.

13. For an extended review of Professor Gilmore's thesis and criticisms, see notes 18-75 and accompanying text *infra*.

14. G. GILMORE, *supra* note 1, at 87.

15. For an extended review of Professor Macneil's thesis and criticisms, see notes 76-131 and accompanying text *infra*.

16. See, e.g., L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM* (1956); J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (1964); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

should be reformed to allow consideration of these ongoing commercial relations.

This Article will discuss first the arguments of Professor Gilmore and review the major criticisms of them. The theories and conclusions of Professor Macneil and his forerunners will then be considered, followed by a review of their criticisms. The Article will conclude with a discussion and comparison of the jurisprudential assumptions and underpinnings of each of these "graveyard theorists"¹⁷ to place their respective arguments in a usable context. This context then will be used to articulate the unanswered questions in the current discussions of contracts.

II. THE DEATH OF CONTRACT—OVERVIEW AND CRITICISM

A. Overview

*The Death of Contract*¹⁸ argues that courts no longer use classical contract theory to resolve disputes about promises. Professor Gilmore begins by noting that while Macneil, Friedman, and Macaulay attempt to describe empirically how contracting parties actually behave, his purpose is to portray how and why the death of classical contract theory occurred—"assembling the trees into a forest."¹⁹ To this end, he separates discussion of the history of the classical theory in Chapters I and II from the discussion of decline and fall in Chapter III. "Conclusions and Speculations" are treated in the last chapter.

The discussion of history begins with the relationship of classical contract theory to the predominantly *laissez faire* economic system of the nineteenth century.²⁰ In that economic system, contracts emerged as an important branch of commercial law as goods and "claims to money based on their manufacture and sale"²¹ became significant repositories of wealth. Enforceable promises exchanged by commercial parties were necessary to manage wealth of great magnitude. Though he notes that the opposite view is commonly held, Professor Gilmore argues that the idea of a general theory of contract grew out of a number of

17. See Milhollin, *More on the Death of Contract*, 24 CATH. L. REV. 29, 31 (1974) (originating the term "graveyard theorists").

18. G. GILMORE, *supra* note 1.

19. *Id.* at 3, n.1.

20. *Id.* at 6-8, 33-34, 94-96.

21. *Id.* at 8-9.

specialized bodies of law regulating particular kinds of commercial agreements and transactions.²²

Yet, according to Gilmore, the classical contract theory was not a natural product of its times. The crux of his historical treatment is that the theory was an ivory tower abstraction created by Langdell, philosophically developed by Holmes, and systematized by Williston. Thus, Langdell "stumbled"²³ upon the general, unitary theory of contract and used it in his treatises and in his newly developing case method of teaching. This creation was a natural result of Langdell's wish to develop a deductive science of law and suffered from its lack of focus on actual problems and events arising from typical bargains.²⁴ Consequently, the utility of the classical theory's unitary system of contract liability was questionable from the beginning because it lacked any relationship to the real world.

For Gilmore, Holmes, not Langdell, was the critical architect of this abstract creation. Holmes provided the philosophical underpinnings of this system and added the crucial objective theory of contract.²⁵ According to Gilmore, Holmes' system of contract rested on three great philosophical pillars, which in turn rested on the foundation of objective theory of contract. The first principle was the limited nature of liability of one person to another for promises made. Promises were enforceable only if supported by consideration in the form of bargained-for exchange.²⁶ Despite existing authority supporting a subjective theory, Holmes reinforced this strict requirement of consideration by articulating an objective standard for evaluating the bar-

22. *Id.* at 9-12, 12 n.18.

23. *Id.* at 12-13. In the same vein, Gilmore goes on to note Langdell's "unexceptional" intellectual abilities and lack of creativity. *Id.*

24. See *id.* at 13. Accord, Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 Wis. L. Rev. 805. For his view that courts at this time were overly concerned with mechanical jurisprudence and elaborate systems based upon deductive logic, see Gilmore, *Legal Realism: Its Causes and Cure*, 70 YALE L.J. 1037, 1041-42 (1961).

25. G. GILMORE, *supra* note 1, at 14-21 (philosophical underpinnings), 35-53 (objective theory). Gilmore describes Holmes as believing "[t]he law moved from 'subjective' to 'objective,' from 'internal' to 'external,' from 'informal' to 'formal.'" *Id.* at 41-42. When rules are made more objective, the fact questions posed by their application become much simpler and problems originally perceived as issues of fact become issues of law. Objective rules determine legal results from the external, observable acts of parties rather than from their subjective intentions.

26. *Id.* at 18-20.

gaining conduct of parties.²⁷ The second pillar required absolute liability, when it was imposed; here again the objective theory of contract assisted by converting troublesome questions of fact into questions of law.²⁸ The third pillar required money damages to be kept low and aimed at compensation, not punishment. The objective theory aided this principle by articulating objective standards for potentially subjective concepts such as foreseeability and by converting ambiguous fact questions for the jury into narrow questions of law for the judge.²⁹

The philosophy having been provided by Holmes, Gilmore argues, the sole task remaining for Williston was to serve as the system builder and restater. To do this, he first had to develop the "correct" system of contract law and, second, he had to torture the facts and reasoning of cases to support the system in matters such as the "rule" of consideration³⁰ and the factual problems of cases such as *Dickinson v. Dodds*.³¹ Thus, according to Gilmore, Williston's system was elegant analytically, but was unsupported by actual judicial decisions. In addition, the system's analytical rigidity made it unable to respond to changes in commercial practices and ultimately contributed to its decline.³²

The decline began, Professor Gilmore argues in Chapter III, almost from the time of the system's creation. Based primarily on English cases, the system was never as universally accepted as Williston would have us believe.³³ The attack on the system came in two forms. First, Cardozo subtly undermined it from within by his judicial craftsmanship, finding bargained-for exchange in unlikely places.³⁴ Second, Corbin confronted it di-

27. *Id.* at 35-41. Holmes did give Williston the objective theory, which was useful in ruling out messy evidence questions and "len[ding] itself beautifully to the abstraction that makes possible doctrinal coherence." Gordon, Book Review, 1974 Wis. L. Rev. 1216, 1232.

28. G. GILMORE, *supra* note 1, at 13-18, 45-48. For example, mistake or impossibility could serve as a basis for avoiding liability only if the mistake or the impossibility was objective.

29. *Id.* at 48-53.

30. *Id.* at 21-28. The cases discussed by Gilmore are *Harris v. Watson*, 170 Eng. Rep. 94 (K.B. 1791) (concerning an agreement by seamen to continue to work a ship shorthanded and in danger); *Stilk v. Myrick*, 170 Eng. Rep. 851, 1168 (K.B. 1809); and *Dickinson v. Dodds*, 2 Ch. D. 463 (1876) (concerning revocation of offers).

31. 2 Ch. D. (1876). See *id.* at 28-33.

32. *Id.* at 33-34.

33. *Id.* at 55-57.

34. *Id.* at 57.

rectly in his insistence on studying the operative facts of actual cases.³⁵ The classical theorists, primarily Williston, responded to these challenges with the restatement idea, but even here the erosion was apparent. Williston was able to include section 75 which articulated bargained-for exchange as the basis for enforceability. However, Corbin's relentless discussion of a number of reliance cases which did not fit the traditional theory resulted in new section 90 on promissory estoppel. This synthesis of Williston's and Corbin's views gave the first *Restatement of Contracts* its peculiarly schizophrenic nature.³⁶ Even early in its history, the classical doctrine was subject to serious exceptions.

The exceptions have now swallowed the rule, Professor Gilmore next argues. The old theory has been dismantled, and contract is merging back into tort. No longer are Holmes' central philosophical pillars used effectively by the courts. First, the traditional notion of consideration is not the exclusive basis for finding liability based upon a promise; indeed, it is not even a primary basis.³⁷ Promissory estoppel has replaced bargained-for exchange whenever there is reliance.³⁸ Liability for benefit received, quasi-contract, is gaining acceptance, although somewhat unevenly.³⁹ Thus, liability premised on enforcement of a promise typically can be found without reference to orthodox consideration except when no party has changed his position in reliance on the promise and no benefit has been conferred. The abolition of contractually based defenses, such as the statute of frauds in promissory estoppel or quasi-contract cases, also indicates that the source of liability is distinct from that of traditional contract law.⁴⁰ Other related developments also support the general aban-

35. *Id.* at 57-58.

36. *Id.* at 58-65. One could argue instead that the *Restatement* achieved a new synthesis; however, it did not synthesize the rules so much as to articulate two potentially conflicting rules. Other examples of the synthesizing process discussed are third party beneficiaries and their rights, anticipatory breach, excuse resulting from impossibility or frustration, and recovery by a plaintiff in default. Interestingly, Professor Gilmore took a somewhat different view of the *Restatement* in 1961; he viewed it as an attempt to keep the mushrooming common-law system from falling under its own weight. Gilmore, *supra* note 23, at 1044-45.

37. G. GILMORE, *supra* note 1, at 66. For a discussion of the English rule, see Chloros, *supra* note 8, at 141; Fridman, *supra* note 3, at 18-20.

38. G. GILMORE, *supra* note 1, at 72.

39. *Id.* at 72-76. See RESTATEMENT (SECOND) OF CONTRACTS § 89A (Tent. Draft No. 2, 1965).

40. G. GILMORE, *supra* note 1, at 87-90.

donment of the classical theory's bargained-for exchange requirement in favor of other bases of liability.⁴¹ Thus, it is argued, the central feature of the old system, bargained-for exchange, simply has ceased to be the exclusive or even a substantial basis for enforcement of promises. The traditional theory of consideration, therefore, does not effectively restrict contract liability.

A similar erosion has been at work on the second pillar of the classical system—the idea that liability, when imposed, is absolute. In construction cases, for example, recovery is typically granted a breaching party for progress payments made in excess of damages suffered.⁴² Similarly, the impossibility defense in sales law, excusing performance only when it becomes impossible, has been expanded into “frustration” and “mistake” excusing performance whenever the world does not turn out to be as the parties expected.⁴³ Absolute liability, therefore, is no longer the effective rule of decision.

The final pillar of the classical system, remedies for breach aimed only at compensation, is also crumbling. Unlike the situation half a century ago, specific performance frequently is available. Courts award recovery of lost profits instead of the market-price differential with increasing frequency, and some courts even overtly award punitive damages in contract cases.⁴⁴ The

41. G. GILMORE, *supra* note 1, at 76-77. See RESTATEMENT (SECOND) OF CONTRACTS § 89B (Tent. Draft No. 2, 1965) (firm offers). Professor Gilmore notes that illusory promises and mutuality of obligation are no longer effective—courts simply imply minimal promises or obligations to get around these doctrines.

42. G. GILMORE, *supra* note 1, at 78-79.

43. *Id.* at 80-83. The Uniform Commercial Code speaks of “occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made” U.C.C. § 2-615.

44. G. GILMORE, *supra* note 1, at 83-85. A commentator has observed recently that these punitive damage awards “really represent an outgrowth of a heretofore camouflaged doctrine rather than the announcement of any startlingly new legal principles.” Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 MINN. L. REV. 207, 247 (1977).

Many of these awards occur in insurance cases when an insurer unjustifiably refuses to pay claims; often the insurer is guilty of egregious conduct. Allowing punitive damages under these circumstances has been justified by the argument that the common law always has allowed punitive damages to protect “a special public interest in preventing oppressive breaches of certain private contracts where a service needed by a majority of the public is at stake.” Note, *Indiana's Allowance of Punitive Damages in Contract Actions Against Insurance Companies: How New Is It?*, 55 IND. L.J. 563, 564 (1980). For a comprehensive review of the theoretical grounds for such awards and their implications

merger of contract back into tort is exemplified by three California cases, which essentially fail to distinguish between contract and tort claims in cases concerning both breach of promise as a contract and breach of the duty arising from the promise as a tort.⁴⁵ The tendency of modern products liability law to use tort-like damage measures and to avoid the contract defenses of privity, disclaimer, and notice also is cited.⁴⁶

With bargained-for exchange no longer the exclusive basis of promissory liability, absolute liability in decline, and remedies exploding well beyond the restrictions of classical theory, the death of classical contract is announced. Although he argued earlier that the classical theory was more a creature of the ivory tower academicians than the courts,⁴⁷ in his post-mortem Professor Gilmore attributes the death primarily to replacement of the nineteenth century *laissez faire* economic system with the twentieth century welfare state.⁴⁸ The doctrine is no longer responsive to the commercial and social needs it was designed to serve and, not surprisingly, has been replaced. The classical theory converted fact questions into legal questions because of its distrust of the civil jury, and the contemporary decline of the civil jury lessened the need for this use of the theory.⁴⁹ Professor

for all contracts, see Holmes, *Is There Life After Gilmore's Death of Contract—Inductions From a Study of Commercial Good Faith in First Party Insurance Contracts*, 65 CORNELL L. REV. 330 (1980). This article argues that courts now blend equity, contract, and tort principles "in requiring parties to exhibit good faith and fair conduct in the performance and discharge of contract duties." *Id.* at 335. It concludes that this blending signals only the limitation of classical contract theory, not its death.

45. G. GILMORE, *supra* note 1, at 91-92 (discussing *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied* 368 U.S. 987 (1962); *Connor v. Great Western Sav. and Loan Ass'n*, 73 Cal. Rptr. 369, 447 P.2d 609 (1968); *Heyer v. Flaig*, 74 Cal. Rptr. 225, 449 P.2d 161 (1969)).

46. *Id.* at 92-94: The liability, however, now is not based on classical tort law, but on a new theory. For a presentation of the thesis that the law is moving from tort to contract for personal injury loss distribution, see O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659 (1977).

47. See notes 23-32 and accompanying text *supra*.

48. G. GILMORE, *supra* note 1, at 94-96. Accord, Brody, *supra* note 3, at 802; Fridman, *supra* note 3, at 22. "The development of contract is largely an incident of commercial and industrial enterprises that involve a greater anticipation of the future than is necessary in a simpler and more primitive economy." Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 555 (1933).

49. G. GILMORE, *supra* note 1, at 98-100. Professor Speidel summarizes this attitude as follows: "The attitude toward contract can now be described as 'easier in, easier out, but greater potential liability while you were there.'" Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1167 (1975).

Gilmore concludes with the idea that the pendulum, which swung away from the classical system, may now be swinging back; he speculates that a new Langdell is waiting in the wings to start the business of system building again.

B. Criticism⁵⁰

To the extent that classical contract law came into existence in response to the market economy of the *laissez faire* nineteenth century, a role for it still exists coextensively with the rule of a market economy today. In a perceptive recent treatment of the respective roles of public and private economic activity, Arthur Okun found a continuing role for private markets: "I regard it as vital that private enterprise continue to be the main mechanism for organizing economic activity in those areas where experimentation and innovation are important, and in those where flexibility matters more than accountability."⁵¹ Because a free-market ideology and a sphere of activity appropriate for its exercise exist today, legal rules based upon these should continue to have a legitimate role to play.⁵² While the area of activity appropriately controlled by free-market forces may be smaller than in Langdell's day, the continued existence of such an area makes one suspect that Professor Gilmore overstated the death of contract.

Substantial criticism of Professor Gilmore's portrayal of the birth of contract also exists. Specifically, Professor Gilmore's treatment of Langdell's importance in originating a unitary theory of contract has been attacked as historically inaccurate. Professor Gordley pointed out that the idea of a general unitary theory of contract has existed in the continental civil-law sys-

50. See, e.g., Mooney, *The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore*, 55 OR. L. REV. 155 (1976); Speidel, *supra* note 46; Gordley, Book Review, 89 HARV. L. REV. 452 (1975); Gordon, *supra* note 26; Reitz, Book Review, 123 U. PA. L. REV. 697 (1975). Danzig collects citations to all the commentary on this book. Danzig, *The Death of Contract and the Life of the Profession*, 29 STAN. L. REV. 1125, 1125 n.2 (1977).

51. A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 61 (1975). The relationship of contract law to private markets is discussed in section III.B. of this Article.

52. Speidel, *supra* note 49, at 1171. See Gordon, *supra* note 27, 1234-37. Approximately 80% of the economy is not classed appropriately as governmentally regulated, and the regulated sector has grown only slightly since the Great Depression. G. NUTTER & H. EINHORN, *ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899-1958* (1969).

tems since the eleventh century and has been taught in England since the twelfth.⁵³ Concerning the development of English and American law generally, Professor Mooney persuasively argued that treatises on the common law included a unitary theory of contract as early as 1790 and showed that at least five such treatises had been written by the time Langdell was thought to have created the idea.⁵⁴ Viewing Langdell as the ivory tower creator of such a system lends no support to the idea that the system was adopted in response to the needs of the *laissez faire* society which used it—although they are not necessarily inconsistent. At a minimum, these commentators raise serious questions about Gilmore's historical view of Langdell's role.

The most serious historical criticism of Professor Gilmore's thesis, however, was directed at his treatment of Holmes' role. First, Holmes as the contract system builder conflicts with his generally prevailing image as a realist, a pragmatist, and one not seriously interested in building elaborate systems of law.⁵⁵ Thus, no apparent reason exists for the author of "[t]he life of the law is not logic, the life of the law is experience"⁵⁶ to have had much interest in building the philosophical underpinnings and analytical constructs of a classical contract law system. Second, Professor Gilmore's view of Holmes as the originator of the bargained-for exchange requirement was weakened by well-documented research indicating that the notion of bargained-for exchange predated Holmes.⁵⁷ Finally, Holmes' own words attack Langdell's casebook and his aim in teaching with cases⁵⁸—a curious attitude toward a fellow architect of the same grand system. Professor Mooney also closely reviewed the cases and opinions which Williston is accused of torturing to fit his system and concluded that Professor Gilmore "failed to substantiate his charge that

53. Gordley, *supra* note 50, at 453. Professor Gordley argues that Langdell contributed to consideration by avoiding some of the then existing problems with the civil-law concept of *causa*. *Id.* at 457-63.

54. Mooney, *supra* note 50, at 164-67.

55. See Gordon, *supra* note 27, at 1231-32; Mooney, *supra* note 50, at 167-69. Gilmore more recently described Holmes: "In this bleak and terrifying universe, the function of law, as Holmes saw it, is simply to channel private aggressions in an orderly, perhaps in a dignified fashion." G. GILMORE, *THE AGES OF AMERICAN LAW* 49 (1977).

56. O. HOLMES, *THE COMMON LAW* 1 (1951). Holmes was not viewed as a contracts revolutionary by Corbin or Williston. See Mooney, *supra* note 50, at 169.

57. See Gordley, *supra* note 50, at 458-59, 463-67; Mooney, *supra* note 50, at 169-71.

58. See Speidel, *supra* note 49, at 1171 (quoting the Holmes criticism).

Holmes and Williston 'distorted' decisions to fit their preconceived theories."⁵⁹

Several additional historical criticisms deserve mention. It has been argued that at least two characteristics of the classical system were developed to serve social purposes and not simply as elegant trappings of an abstract theory: (1) the absolute character of contract theory was a by-product of its potential for social engineering uses,⁶⁰ and (2) the conversion of fact questions into law questions was designed to achieve certainty in a commercial society perceived to be in need of it.⁶¹ Professor Gordley concluded that the problem with Professor Gilmore's history is that its focus is on abstract historical forces rather than on real people trying to solve real problems confronting society—thus, he never directly examined the problems or the solutions to determine their present relevance.⁶²

It is difficult for a nonhistorian to evaluate what remains of the account of the birth of classical contract theory. Clearly, serious questions have been raised. The more important questions for this paper, however, concern Professor Gilmore's description of the present-day reality of the reported demise of contract. These criticisms center on Professor Gilmore's conclusion that consideration based on bargained-for exchange died under the onslaught of promissory estoppel and quasi-contract.

While there have been mild objections to Professor Gilmore's description of the facts in the decline and fall of the theory concerning the availability of contract defenses such as the statute of frauds in promissory estoppel cases,⁶³ most of the criticism has focused elsewhere. Specifically, objections have been made to the conclusions drawn about the continuing vitality of classical contract law. Accepting the existence of promissory estoppel and quasi-contract as alternative bases for promissory liability, Professor Speidel accurately stated the problem:

59. See Mooney, *supra* note 50, at 172 (citations omitted).

60. See Gordon, *supra* note 27, at 1232. Brody argues that the benefit-detriment test was related to the commercial realities of the time, as was the refusal to evaluate adequacy of consideration. Brody, *supra* note 3, at 838.

61. See Gordon, *supra* note 27, at 1233.

62. Gordley, *supra* note 50, at 454-57 (discussing the difficulties resulting from Gilmore's "historicism").

63. See Milhollin, *supra* note 17, at 46-47 (arguing that the state of the law is unclear at this time).

To put the matter more specifically, in the continuing transition [from grand theory to welfare state] what is left of the ability of private citizens, through various forms of consent, to protect themselves from civil liability or to order the future in ways that will be supported in the courts?⁶⁴

Although Professor Gilmore does not answer this question, the implication from his theory seems to be that very little will be left of a private citizen's ability to order the future by agreement. Because enforcement of promises will be based on reliance or benefit conferred rather than on bargained-for exchange, contract theory granting enforcement based on bargained-for exchange has died. Yet, that the "death" of contract has occurred does not necessarily follow:

[I]t is difficult to see how the expansion of those doctrines supports an argument that the other side of contract theory—the protection of the promisee's expectancy interest in his bargain—was therefore weakened in any way or made to depend upon some basis for recovery other than a promise.⁶⁵

Protection of this expectancy interest traditionally was viewed as one of the primary purposes of contract law.⁶⁶ Classical contract theory performs two roles in giving this protection. First, it provides a basis for enforcing promises given in exchange for other promises or actions, eliminating the need for proof of reliance. This enforcement role encourages reliance by eliminating the need to prove it—an important facilitation of commercial dealings.⁶⁷ Second, the classical theory provides a firm basis for planning transactions to achieve legal enforceability. Such planning is less reliable when using only promissory estoppel or quasi-contractual theories for enforcing promises.⁶⁸ Persuasive reasons have been advanced for using the bargained-for exchange idea of consideration as the core notion for a the-

64. Speidel, *supra* note 49, at 1177-78. Milhollin argues that the process of making private agreements remains the primary energizing force for commercial conduct in the areas now subject to regulation outside traditional contract law. Milhollin, *supra* note 17, at 49-60.

65. Milhollin, *supra* note 17, at 46.

66. See Strasser, Book Review, 9 IND. L. REV. 525, 532-34 (1976) (including citations therein).

67. See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61-62 (1936).

68. See Strasser, *supra* note 66, at 535.

ory promoting such planning and enforcement.⁶⁹ Without a clear standard describing one group of promises that will almost always be enforced, contract law cannot perform these functions and provide needed predictability.⁷⁰ One need not entirely abandon the certainty provided by the classical theory to obtain the increased flexibility of promissory estoppel and quasi-contract. Although Professor Gilmore seems to have provided a useful description of the change taking place, he may have overlooked functions of the classical theory's consideration doctrine that should give it continuing vitality.

Commentators have offered less criticism of Professor Gilmore's argument that the second and third pillars of classical contract theory have eroded. He can be mildly criticized for relying solely on noncommercial cases in discussing the decline of the system's notions of absolute liability and limited remedies that resulted in shifts from contract to tort.⁷¹ Several Uniform Commercial Code provisions, however, also are cited as evidence;⁷² presumably cases applying these could have been found to provide examples of mainstream commercial disputes. Concerning remedy expansion, recent cases granting punitive damage recovery for contract claims perhaps are better viewed as overtly describing and expanding⁷³ traditionally covert court practices. Yet these observations are minor qualifications rather than criticisms. The more central question is whether a showing that liability is not absolute and remedies have expanded necessarily erodes completely the core of the classical theory—bargained-for exchange as consideration. This conclusion does not appear to be warranted.

69. Professor Speidel lists four: (1) to channel conduct and to insure deliberation; (2) to protect and to structure market transactions; (3) to support needed executory exchange while protecting idiosyncratic bargains; and (4) to permit development of remedies that protect the expectation interest. Speidel, *supra* note 49, at 1170. Ellinghaus stresses the ideas of reciprocity and exchange. Ellinghaus, *supra* note 6, at 274. To the extent that any system of liability, contract, or tort uses bargained-for exchange as one reason for enforcing promises that system will have the same difficulties in determining when there has been an exchange as our present doctrine of consideration. See Gordley, *supra* note 50, at 466-67. Where enforcement is also available on other bases, however, the problem of determining when there has been an exchange will arise in fewer cases.

70. See Treitel, *supra* note 8, at 449. For a partial collection of current reform proposals, see note 8 *supra*.

71. G. GILMORE, *supra* note 1, at 92-94.

72. See *id.* at 77 (citing U.C.C. §§ 2-205, 2-209).

73. See note 45 *supra*.

A final criticism of *The Death of Contract* asks why the classical theory has died and questions the explanations given. While the growth of new bases for enforcing promises cannot be denied, Professor Gilmore fails to explain adequately the complete reversal portrayed; has the break been either so sharp or so complete? There are serious problems in explaining the decline of the classical theory primarily in terms of a shift from the *laissez faire* market system to the twentieth century welfare state.⁷⁴ Professor Mooney has marshalled the scant empirical evidence from the studies of Hurst, Macaulay, Friedman, and his own work to suggest that little change occurred in contract theory in the cases before and after Langdell and Holmes.⁷⁵ This evidence causes one to question whether creation of the classical theory was as sharp a break as portrayed; perhaps its decline is also proceeding less abruptly.

Despite some serious questions about his historical work, Professor Gilmore persuades us that new theories have been developed and accepted to supplement and expand the traditional reasons for enforcing promises. While breaking no new ground in contract theory, such a description is useful and helps provide a much needed context for discussion of the current state of doctrine. The conclusion that traditional contract theory is dead, however, and the implicit finding that it has no role to play in twentieth century life, are less persuasively established.

III. MACNEIL AND HIS FORERUNNERS⁷⁶

The works of Professor Ian Macneil and his forerunners have a very different focus. While Professor Gilmore attempts to explain what the courts are doing and why, these scholars take as their starting point a study of the behavior of parties engaging in commercial activity who may have a need for the legal institution of contract. Their goal is to describe empirically this world and its interrelationship with the legal system and then to

74. See Jones, *The Jurisprudence of Contracts*, 44 CIN. L. REV. 43 (1975); text accompanying notes 51 & 52 *supra*.

75. Mooney, *supra* note 50, at 175. Gordon explains the survival: "Case law is among other things the ideology of mandarins." Gordon, *supra* note 27, at 1238.

76. See L. FRIEDMAN, *supra* note 16; J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (1964); Macaulay, *supra* note 16.

explore the implications of these findings about the nature and utility of contract law.⁷⁷

A. *Macneil's Forerunners—Hurst, Macaulay, and Friedman*

The thesis of these scholars is that the present contract-law system does not concern itself with problems that do in fact arise frequently in the world of commercial contract makers and that these commercial contract makers do not bring their problems to the courts to be solved by the legal system.⁷⁸ Several reasons are given for this lack of congruence between the system of contract law and contracting behavior. First, damage awards are unrealistically low, making the potential payoff from litigation not worth the cost.⁷⁹ Thus, extra-legal sanctions such as business ostracism have developed⁸⁰ and have assumed great importance. Second, business parties make commercial deals for the benefits to be gained and are relatively less interested in planning for legal enforceability, legal sanctions, or indeed any kind of legal relationship.⁸¹ Third, the real problems in commercial relationships concern interpretation of what the agreement meant in substance, while traditional doctrine maintains a misplaced emphasis on what was in fact said by the parties.⁸² This situation is aggravated by the unitary and abstract nature of traditional doctrine. The net result is that most disputes of commercial significance are not decided in courts, and only one-shot transactions or otherwise commercially aberrational matters are brought there.⁸³ The empiricists conclude that the classical con-

77. Friedman & Macaulay, *supra* 24, at 808 (stating that their focus is on contracting behavior). They conclude from their study: "Its subject matter is the economic order or the business world as it actually functions, and its method is empirical." *Id.*

78. See Macaulay, *Elegant Models, Empirical Pictures and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 508-10 (1977).

79. See Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 833, 834-36; Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 824-26. Litigation is costly both in direct expense, in disrupting business relationships, and in disruption of a party's internal operations by taking the time of management and other personnel.

80. See Friedman & Macaulay, *supra* note 24, at 815.

81. See *id.* at 813-14; Macaulay, *supra* note 78, at 509.

82. See, e.g., Friedman & Macaulay, *supra* note 24, at 813; Reitz, *supra* note 50, at 700.

83. See Macaulay, *supra* note 77, at 512-15 (discussing four types of cases that will be brought: (1) a plaintiff is so economically powerful that he need not worry about defendant's reaction disrupting commercial relationships; (2) an economically powerful

tract-law system is neither alive nor dead—it is simply irrelevant to the actual functioning of the commercial contracting system it should serve and regulate. The significant disputes are not brought to the courts; consequently intelligent policy making through dispute resolution is not possible.

The first study to appear was Professor Willard Hurst's *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915*.⁸⁴ The study is a legal, economic, and social history of law and its interrelationship with one industry. Its framework is to focus on four general concepts of law in society. Chapter IV, the first of two chapters dealing with the general concept of contract, discusses the ways in which contract law in the courts contributed to the organization of the market.⁸⁵ Professor Hurst finds that court decisions and contract rules helped create a market and it dispersed resource allocation and production decisions by enforcing private agreements concerning them. In addition, contract law expanded the size of the market. Contract law encouraged a greater quantity of transactions through decisions favoring business venture and bootstrap financing so essential to growth of a new and capital-starved industry.⁸⁶ Similarly, the law was flexible enough to provide for an expanded scale of market operations, and significantly increased business ventures, as these became economically necessary.⁸⁷ Contract law also provided a useful, flexible system for contract administration which solved disputes arising out of contract performance, contract existence, and contract interpretation.⁸⁸

Thus, Professor Hurst concludes, contract law in its general and abstract form served the lumber industry well by giving it a

party desires to shift liability to an economically weaker one; (3) the commercial relationship is already shattered beyond repair and plaintiff is simply trying to salvage whatever compensation he can; and (4) plaintiff attempts to collect debts as a bureaucratic function and to discipline individual trading partners. He concludes that: "[E]conomically important contract cases that adjudicate rights are too rare to serve as a solid foundation for the classical model." *Id.* at 515). See Friedman & Macaulay, *supra* note 24, at 816-17; Gordon, *supra* note 27, at 1222-26.

84. J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (1964).

85. *Id.* at 289-343.

86. *Id.* at 297-321.

87. *Id.* at 321-33.

88. *Id.* at 337-42. The Wisconsin Legislature generally shared these market facilitation goals and participated in policymaking designed to achieve them. *Id.* at 343-423.

well-developed body of law to facilitate market growth. Unfortunately, this same generality and stability made adjustments in contract law more difficult as the industry matured and required more individualized legal rules and standards.⁸⁹ He also concludes that, as public policy changed from its nineteenth century unqualified support of private markets to substantial regulation of industry in the twentieth, the initiative for articulating and enforcing these new policy goals shifted from the courts to the legislatures.⁹⁰ While the courts and their common law of contract could promote the market mechanism as an efficient resource allocator, they could not establish and administer substantial public policies concerning conservation and land use that an informed twentieth century public policy demanded. Thus, contract law remained stable, but some of its subject matter was removed for separate treatment by the legislatures.⁹¹

This view of contract law as a shrinking residuary, which operates only when some other body of law does not, is echoed in Professor Friedman's study.⁹² Again focusing on Wisconsin, Professor Friedman studied the application and modification of contract law generally during three periods: Period I from 1836 (when Wisconsin became a territory) until 1861; Period II from 1905 to 1907 and 1913 (the age of the progressives); and Period III from 1955 to 1958 (the period of post-war economic boom and the growth of metropolitan areas, big government, and mass transport and communications). The study concludes that in Period I the courts and their common law of contract were the primary, creative determiners and initiators of market policy through a generalized, abstract body of contract law of general applicability. By Period III, however, their role had declined to that of resolvers of particular, commercially marginal disputes through primary emphasis on the unique facts of the case and with reference to policies set largely by the legislature or administrative agencies.⁹³

Friedman's conclusion rests on five specific findings. First, the market support functions of contract law, so central to the

89. *Id.* at 294-98.

90. *Id.*

91. *Id.* at 343-44.

92. See L. FRIEDMAN, *supra* note 16.

93. *Id.*

decisionmaking of Period I, became almost irrelevant to decisions of the particularistic, noncommercial cases of Period III. It is difficult and unnecessary to make commercial market policy in noncommercial cases. Second, the court declined from a position of great policymaking creativity and initiative in Period I to, by Period III, a much more modest role of adjusting and applying policies made primarily by others.⁹⁴ Third, commercial parties stopped bringing their commercially important disputes to the courts; by Period III very few of their cases were based on significant market transactions, and most contracts cases were either personal disagreements or "arose out of the . . . [commercial] marginality of the litigants."⁹⁵ Thus, while judicial abstraction and creativity in making policy was needed for the mainstream commercial disputes brought to the courts and contract law in the nineteenth century, the cases of the twentieth century required factual particularity and application of externally established policies. Fourth, the courts and contract law gradually lost the center stage to its rivals. While in Period I the courts laid down general, abstract rules to govern market policy and the legislatures provided narrow, fact-oriented exceptions, by Period III the roles had been reversed.⁹⁶ Finally, the style and technique of judicial opinions reflected the new perception that most social problems demanded more affirmative policy statements and conscious management than a court could give them. Generalized contract law was increasingly replaced by affirmative regulation.⁹⁷ Professor Friedman finds a continuing role for the courts and traditional contract law, but only in the handling of particular, commercially marginal disputes.⁹⁸

Professor Macaulay's study confirms this view in his conclusion that most business parties do not resort either to the courts or to contract law for resolution of most commercially significant disputes.⁹⁹ His work focuses on the perceptions and attitudes of business parties rather than on the work of the courts. He con-

94. *Id.* at 184-98.

95. *Id.* at 198-202.

96. *Id.* at 202-10.

97. *Id.* at 210-15.

98. *See id.* at 215. He also finds that the courts have developed a new role in protecting the rights of individuals against power-wielding institutions, public and private, of the twentieth century mass society. *See id.* at 209.

99. *See Macaulay, supra* note 15.

cludes that business parties typically do not plan for legal enforceability when negotiating commercial transactions; that disputes are typically resolved with reference to a generalized, commercial, good-faith standard, rather than with reference to contract law; and that courts are rarely used to resolve commercially significant disputes.¹⁰⁰

Yet these empiricists are uncertain about the policy implications of their conclusions. Professors Friedman and Macaulay argue that the law school contracts courses are outmoded and should be changed.¹⁰¹ In a more recent comparative study, however, Professor Macaulay speculates: "[i]t is questionable whether capitalist, socialist, or mixed economic systems would benefit if more disputes were resolved by the application of officially sanctioned contract norms."¹⁰² Professor Macneil's theories can be approached as an attempt to suggest how the present system of contract law can be adapted to reach most commercial exchange behavior.

B. Macneil's Relational Theory

Against this background of empirical research, Professor Ian Macneil has developed a theory of regulating all exchange behavior by contract. He begins by defining contract to cover all economic exchange relations, not just exchange based on agreements. Contract, then, is the device used to project exchange into the future.¹⁰³ This definition encompasses exchange based on agreement, but extends beyond it in ways that are critical to

100. *Id.* at note 24.

101. See L. FRIEDMAN, *Preface to CONTRACT LAW IN AMERICA* (1965); Friedman & Macaulay, *supra* note 24.

102. Macaulay concludes that some slack, sloppiness, and irrationality in the contract making and enforcement system may be the price we pay for business flexibility necessary for growth. Macaulay, *supra* note 77, at 524-25.

103. Macneil, *supra* note 2, at 694-96, 712, 733-34. See generally Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627 (1975); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. L. REV. 854 (1978); Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974) [hereinafter cited as *Presentation*]; Macneil, *Whither Contracts?*, 21 J. LEGAL EDUC. 403 (1969) [hereinafter cited as *Whither Contracts?*]. For a more traditional case analysis, see Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L. REV. 495 (1962). For a collection of introductory and explanatory essays from his casebook, see Macneil, *Essays on the Nature of Contract*, 10 N.C. CENT. L.J. 159 (1979).

his thesis. These ways will be explored after a review of Professor Macneil's view of traditional contract doctrine.

Traditional contract doctrine, he argues, is based on the idea of presentiation: "Presentiation is thus a recognition that the course of the future is bound by present events *and* that by those events the future has for many purposes been brought effectively into the present."¹⁰⁴ Traditional doctrine attempts to permit parties to presentiate—to control the future by bringing it into the present and to plan for it through bargained-for exchange. Its goal is to govern completely all aspects of the exchange.¹⁰⁵ To reach this goal, it assumes that exchange takes place in discrete transactions which are individualized and unconnected to other discrete transactions.¹⁰⁶ This assumption is, for Macneil, a critical characteristic of our traditional contract-law system.

In the classical system, presentiation is accomplished by enforcing bargained-for exchange based on the mutual assent of the parties.¹⁰⁷ Parties can be required to do certain things in the future because they agreed to them in an exchange. When this assent had not gone far enough and did not reach aspects of the exchange then in dispute, courts extended it with a finding of assent which was implicit or wholly fictitious:

As much as possible of the content of the relation, both structure and detail, is forced into a pattern of mutual assent expressed at some simultaneous point of time; content necessary to achieve presentiation but which cannot sensibly be rationalized into a pattern of instantaneous mutual assent, will be supplied *eo instante* by the legal system in a form as precisely predictable as possible.¹⁰⁸

Professor Macneil argues that parties to an exchange wish to control the future; in the traditional system, presentiation by bargained-for exchange was the means to accomplish this.¹⁰⁹

104. Macneil, *Presentiation*, *supra* note 103, at 589.

105. See Macneil, *Presentiation*, *supra* note 103, at 592; Macneil, *supra* note 2, at 693.

106. See Macneil, *supra* note 2, at 693.

107. See Macneil, *Presentiation*, *supra* note 103, at 592-95; Macneil, *Whither Contracts?*, *supra* note 103, at 403-06.

108. Macneil, *Presentiation*, *supra* note 103, at 593-94.

109. *Id.* at 595; Macneil, *Whither Contracts?*, *supra* note 103, at 406.

Presentation is most effective in controlling discrete transactions in the future, and, in such a system, assent expressed through promise is one good means to accomplish presentation.¹¹⁰ This proposition is true because at one point in time it is possible to come close to complete, mutual planning. The key here, however, is limiting presentation to discrete transactions.

Discrete transactions are those in which "the socioeconomic structures leading to them are congenial with strong individualism."¹¹¹ To illustrate, Professor Macneil analogizes a discrete transaction to a service station stop for gasoline.¹¹² Economic exchange is virtually the only motive for the transaction, and the relationship touches only economic exchange aspects of the parties' identities and relations. Communication is limited to aspects of the exchange. The only personal satisfactions involved are economic ones related to exchange. Although not expressly identified, the lack of a relationship between this transaction and any previous or possible later ones clearly seems to be an implied characteristic. Thus, discrete transactions are one-shot deals in which the parties' motives, actions, and satisfactions are exclusively economic and exchange related. He calls these discrete transactions "transactional exchanges."

These transactional exchanges can be contrasted with relational exchanges, in Professor Macneil's vocabulary. Just as transactional exchanges result from discrete transactions, relational exchanges result from a continuing exchange relationship between two parties. (The distinction is sometimes articulated as one between contract transactions and contract relations.) Contract transactions (transactional exchanges) were analogized to a service station stop for gasoline; contract relations (relational exchanges) are analogized to a traditional marriage (in the exchange sense).¹¹³ Thus, contract relations have the characteristics of whole-person relations which include more than economic motives, deep and extensive communication, and significant elements of noneconomic personal involvement and satisfaction. As

110. See Macneil, *Presentation*, *supra* note 103, at 595; Macneil, *supra* note 2, at 712.

111. Macneil, *supra* note 2, at 743.

112. *Id.* at 720-23. He notes the analogy to the distinction by sociologists between primary and secondary relations. *Id.*

113. See *id.* at 720 n.85. Cf. Macneil, *supra* note 103, at 596.

this distinction has developed, the focus has changed from purely transactional or relational exchanges to identification of transactional and relational characteristics, respectively, of all exchanges.¹¹⁴

Professor Macneil's theory is built around this distinction. Because there are relational exchanges and relational characteristics of all exchanges, contract law and doctrine should recognize and regulate these, instead of simply assuming that all exchange takes place in discrete, transactional contracts or contracts with essentially transactional characteristics. Based upon the empirical studies discussed above, as well as his own observations, Professor Macneil concludes that the kinds of behavior regulated by traditional contract law, and the kinds of behavioral assumptions made about contracting parties, do not exhaust the kinds of behavior actually exhibited by parties in exchanges.¹¹⁵ Since he has defined contract to encompass all exchange, presumably contract law should govern relational behavior as well as transactional behavior.¹¹⁶

The need to govern relational exchange behavior in addition to transactional exchange behavior is heightened when one realizes that there are some relational characteristics in all exchanges. Transactional exchange behavior is used to project exchange into the future and to control it; Professor Macneil argues that the nature of promise making and exchanging, with its inherent ambiguities, means that an exchange of promises cannot be the complete basis for dealing with the future. The commercial relations of the parties will, or may, fill this gap.¹¹⁷ Exchange may be projected into the future by the relations of the parties, as well as by their agreements, and "[t]he dependence, the motivation, and inevitably, the obligations arising from such relations may affect future exchange just as rigorously as any promise."¹¹⁸ Since virtually every exchange will have

114. See Macneil, *supra* note 2, at 738-40. He uses two axes, transactional and relational.

115. *Id.* at 694-95.

116. See *id.* at 805-15. For a discussion of the difficulty in using transactional rules to regulate relational behavior, see Macneil, *Presentation*, *supra* note 103, at 597-609.

117. See Macneil, *supra* note 2, at 726.

118. *Id.* at 719. For illustrations of primarily relational exchanges, see Macneil, *Presentation*, *supra* note 103, at 597. Accord, Speidel, *supra* note 49, at 1174; Reitz, *supra* note 50, at 700. Brody views contract as a social act. Brody, *supra* note 3, at 797-

some transactional characteristics and some relational characteristics, contract law should consider both explicitly.

Present contract law is inadequate to deal with the relational characteristics of exchange because it is premised on the notion that exchange is a purely transactional phenomenon with the sole purpose of promoting presentiation as a means of controlling the future. Yet, relational exchange seeks to control the future, not by specifically planning for it, but by creating and maintaining a commercial relationship that will be sufficiently sturdy to accomplish future exchange. "As one moves towards the relational end of this spectrum, presentiation plays a relatively smaller role, since [an] increasing [number of] aspects of the relation must be left to future determination."¹¹⁹ In *The Many Futures of Contracts*,¹²⁰ Professor Macneil spends over half the article showing how specific aspects of exchange, affecting most of its substance, vary as the relational characteristics of the exchange vary.¹²¹ The aspects of exchange affected by its relational characteristics include crucial matters of the substance of the exchange: (1) measurability and measurement of exchange; (2) sources of socioeconomic support; (3) duration; (4) commencement and termination; (5) planning, including focus, specificity, sources and forms, "bindingness," and conflicts of interest; (6) future cooperation—postcommencement planning and performance; (7) incidence of benefits and burdens; (8) obligations undertaken; (9) number of participants; and (10) participant views of the exchange.¹²² Because these affected aspects are so central to the substance of exchange, Macneil argues that it is the proper function of law to govern the relational aspects of the transaction and to do so with rules expressly designed to govern contract relations.¹²³ Failure to do so means that, in some in-

98.

119. Macneil, *Presentiation*, *supra* note 103, at 596. Although not consciously acknowledging Macneil, Dugdale & Lowe, presumably are discussing the kind of rule Professor Macneil advocates. Dugdale & Lowe, *Contracts to Contract and Contracts to Negotiate*, 10 J. Bus. L. 28 (1976).

120. Macneil, *supra* note 2.

121. *Id.* at 744-805.

122. *Id.*

123. Macneil, *Presentiation*, *supra* note 103, at 608-09; Macneil, *supra* note 2, at 744-805. Reitz notes that most contract disputes concern interpretation of terms and that traditional contract doctrine provides for these disputes only tools which are "blunt and clumsy." Reitz, *supra* note 50, at 700.

stances, the relational characteristics of exchange are not reached by contract law at all, and in other instances the relational characteristics are governed by the misuse of rules designed for a transactional setting.¹²⁴ In addition, doctrinal confusion is introduced into our essentially transaction-based system by the existence of some specific rules which are apparently relational.¹²⁵

Professor Macneil concludes by identifying five basic norms, which are common to all law governing exchange behavior:¹²⁶ (1) reciprocity; (2) effectuation of the parties' roles; (3) limited freedom of exercise of the right of choice; (4) effectuation of planning; and (5) harmonization of contracts (exchange) with their internal and external social matrices. Using these norms, a system or systems of rules should be constructed to govern contract transactions and contract relations. Such an approach would have four virtues. First, it would supplement traditional contract doctrine by providing relational rules for relational cases and terminate the present misuse of transactional rules. For example, the attempt to place what was traditionally known as a unilateral contract in a transactional setting forces definition of the rights and duties of the parties at the time of "agreement" rather than with reference to their future relational expectations. Second, it would serve as a basis for the reunification of contract law, recombining the central features of whole systems of exchange regulating law, such as corporations or labor law, which have spun off. Third, it would relieve traditional contract doctrine of the pressure of coping with situations for which it was never designed. Finally, recognition of the basic norms and relational aspects of contracts would result in more realistic analyses of the concept of consent and its limitations, in both relational and transactional cases.¹²⁷

In sum, Professor Macneil argues that relational behavior is important to exchanges and that our contract law should take

124. Macneil discusses the problem in connection with specific sections of the *Restatement (Second) of Contracts*. Macneil, *Presentation*, *supra* note 103, at 597-609.

125. *Id.* at 603-08. In the *Restatement (Second) of Contracts*, specific problems arise in Chapter 9 concerning the scope of contract relations and in Chapter 10 concerning performance and nonperformance.

126. This list is a shortened paraphrase of Macneil. Macneil, *supra* note 2, at 805-15.

127. See Macneil, *Presentation*, *supra* note 103, at 601-03.

cognizance of this fact. While it is difficult to disagree with this conclusion, one can disagree with the legal structure Macneil has erected upon it. The critical question is not whether exchange relationships exist nor whether they have an effect on the substance of exchange. It is whether a body of law based on assent to specific exchanges—exchanges which have been deliberately bargained for with a reciprocal assent as the condition (the body of law labeled contracts)—should be expanded to cover exchanges that do not have this characteristic.

Professor Harry Jones has argued recently that the traditionally expressed idea of contract is an idea of compelling emotional force which has attained the status of a social institution.¹²⁸ Noting origins in the compact between the Children of Israel and Jehova and the frequently expressed contractual basis of political obligation, he observes:

To most people, at all stages of history, there is a certain self-evident rightness about *pacta sunt servanda*, the moral imperative that obligations freely agreed to are to be honored and performed.¹²⁹

. . . .

Contract, somehow, is a compelling and durable idea in the mind, perhaps even in the subconscious, of mankind.¹³⁰

In response to the observation that society's triumphal march from status to contract may have stopped and retreated, Professor Jones argues that areas of decision formerly controlled by superior economic power, through agreements, are not being directly regulated and that the incidence of truly bargained contracts has not declined.¹³¹ While this idea of contract may not be coterminous with the precise concept in our contract law, the core of deliberate agreement to specific exchange seems to be the same. Certainly more directed activity than entry into a relationship is envisioned. Thus, one must question whether the law of contract is an appropriate place to regulate activity which, in the traditional and emotionally powerful sense, is not contracting. It is also questionable whether an extension to cover merely "relational" behavior is appropriate given our prevailing

128. Jones, *supra* note 74, at 44-50.

129. *Id.* at 44.

130. *Id.* at 47.

131. *Id.* at 49-50.

social and economic ideals of limited government and, if so, is appropriately labeled contract. Ultimately this question must be answered by an examination of the role determined to be appropriate for law in the area of exchange behavior.

IV. GILMORE AND MACNEIL—JURISPRUDENTIAL ASSUMPTIONS AND SOME FURTHER QUESTIONS

Professors Gilmore and Macneil agree on the existence of inadequacies in our present contract law—Gilmore because it is dead and no longer used by the courts to decide cases and Macneil because it does not cover large areas of human conduct and motivation which are involved in exchanges and which can dramatically affect the substance of exchange. Thus, one is tempted to conclude that they are articulating different aspects of the “graveyard theory” of contract and should be read as essentially consistent and supplementary. It is the thesis of this Article, however, that such a temptation should be resisted; these two writers are pursuing different goals. First, the authors’ definitions of the proper scope of contract law in governing some or all exchange behavior is different, and, second, they appear to differ in their views of the purpose for contract law in society. Professor Gilmore does not articulate a wish for the scope of traditional contract law to be expanded substantially to reach additional kinds of exchange behavior; Professor Macneil, however, does wish to expand the scope of contract law to reach relational as well as transactional exchange behavior. In addition, Gilmore proceeds from the premise that the purpose of contract law is primarily to resolve disputes rather than to regulate affirmatively. As discussed below, Macneil is unclear about the ultimate purpose of contract law. Thus, despite their agreement that there are inadequacies in traditional contract doctrine, they would likely not agree on either the causes or the remedies for these inadequacies.

A. *Gilmore’s Traditional Scope and Purpose of Contract Law*

Traditional contract law does not apply to all promises; its scope is limited to promises about specific future transactions given in exchange for other promises or actions. It does express a number of specific policies in terms of the characteristics that

either the promises or the exchange must have,¹³² but it comes into play only with promises about future transactions. Professor Gilmore tells us that this scope may include promises about future transactions when there is no bargained-for exchange, but there is either reliance (promissory estoppel) or benefit conferred (quasi-contract). He does not appear to question the limited application of contract law to promises about specific exchanges. Although he has not done so, he might have noted that a number of specialized bodies of law have been created to deal with continuing exchange relationships when a need for such specialized coverage and more affirmative regulation has been perceived.¹³³ In these instances, however, a specific need for expanded regulation and scope of coverage has been identified, typically by legislatures. The change is in the form of an exception to the traditional system. In addition, more direct sanctions than simple nonenforcement of contracts typically are required to accomplish this affirmative regulation.¹³⁴ To the extent that the traditional system, as modified by Professor Gilmore's description, survives, the traditional limitations regarding the scope of application of its rules should also survive. As Professor Jones has argued, contract is ultimately a constitutional device articulating the circumstances in which parties may exercise contract's private law creating power.¹³⁵ Specifically, parties may use contract to create private law for their transactions; this private law will be publicly enforced only if the parties make promises about specific future exchanges. Professor Gilmore does not appear to disagree with this traditional prerequisite to the exercise of the private lawmaking power contract confers.

Further, *The Death of Contract* should be evaluated according to its author's view of the function of private law in the courts. Professor Gilmore has argued recently that lawyers

132. For example, the Statute of Frauds prescribes how certain promises must be expressed, and rules concerning duress articulate a basic policy that the exchange must not be forced on one party by another.

133. See Milhollin, *supra* note 17, at 50-51. Labor law and corporation law are two examples of such separate bodies of law. Hurst and Friedman discuss the spinning-off process as part of the reason for the "decline" of contract law. See text accompanying notes 81-91 *supra*.

134. See text accompanying notes 140-42, 146 *infra* (discussing the sanction of nonenforcement).

135. Jones, *supra* note 78, at 50-53.

should guard against any all-purpose, theoretical solutions for our society's problems:

As lawyers we will do well to be on our guard against any suggestions that through [private] law, our society can be reformed, purified, or saved. The function of [private] law, in a society like our own, is altogether more modest and less apocalyptic. *It is to provide a mechanism for the settlement of disputes* in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.¹³⁶

(Presumably, Professor Gilmore intends this statement to apply only to private law as applied by the courts, in view of the fact that this statement is made in the context of discussing roles and functions of individual lawyers.) This mechanism for dispute settlement will permit gradual adjustment to the change which is inevitable in any society. And, within this function of private law, "[t]he function of the lawyer is to preserve a skeptical relativism in a society hell-bent for absolutes."¹³⁷ Private law in the courts will, in this view, reflect the values and norms of a society more than it will determine them; its function is to resolve disputes.

In keeping with dispute resolution as the function of private law, *The Death of Contract* is aimed at describing how contract-type disputes are in fact being resolved.¹³⁸ It accurately adds to conventional knowledge the observations that traditional contract theory is no longer exclusive because other bases for enforcement of promises are now being used by courts, that new and expanded excuses for nonperformance are now being accepted, and that greater and different remedies for failure to perform promises are being granted.¹³⁹ Presumably, if he were persuaded that his description omitted part of the existing and needed theory, as argued elsewhere in this Article, Professor Gilmore would amend the description to that extent. But the focus

136. G. GILMORE, *supra* note 55, at 109 (emphasis added). He goes on to refer to law as an "unstable mass in a precarious equilibrium." *Id.* at 110. However, disputes must be resolved with reference to some criteria and the ultimate goals of a body of law will be reflected in these criteria. See Section IV.B., *infra*.

137. *Id.* at 110.

138. G. GILMORE, *supra* note 1, at 3-4.

139. See generally Milhollin, *supra* note 17, at 29-30; note 45, *supra*.

of inquiry would continue to be on dispute resolution. Professor Gilmore shares this focus with traditional contract law: "[C]ontract law has no direct application to the transaction until a dispute arises that is not settled by agreement and the aggrieved party petitions a court for redress."¹⁴⁰

B. Goals of Dispute Resolution Through Conventional Contract Law

If dispute resolution, rather than affirmative social regulation, is the purpose of conventional contract law, the inquiry must then turn to the goals of such dispute resolution. By what criteria are disputes between contracting parties to be resolved and in pursuit of what social ends? Of course, the fact that disputes are resolved by courts with regular procedures, rather than through trial by combat, blood feud, or law of the jungle, is a means of positive, elementary social ordering; rational non-violent resolution is itself a social end. Contract law, however, is pursuing far more refined social goals in its resolution of disputes.

This section will review the conventionally articulated goals of traditional contract law and provide an arguable support for each. (In preparing the Article, the author expected to find a complete and coherent literature on this topic. However, research has disclosed only the few sources cited that address the problem in greater depth than casebook introductions.) The coverage here is not intended primarily as new doctrinal development, but as a coherent statement of the conventional wisdom and a plausible justification and rationalization. This section is intended to serve as a reference point for the following section's discussion of Macneil's potential impact on these conventional goals.

The conventional goals of contract law can be grouped into four general categories. First, contract law seeks to support private markets. Typically, this goal is pursued by ordering payment of compensatory damages as a surrogate for specifically enforcing the promise, although specific enforcement is being ordered more frequently. Second, contract law attempts to regu-

140. Speidel, *supra* note 76, at 822. See, e.g., H. HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 83-84 (1961).

late certain conduct in the bargaining process. Third, it seeks limited advancement of some fundamental social policies by denying enforcement to certain contracts or the contracts of certain parties. Fourth, it seeks to establish limits on the use of contract for the exercise of social, political, or economic power by certain powerful entities. Pursuit of each of these last three goals serves to limit pursuit of the goal of supporting private markets. Yet these limitations must themselves be kept within bounds if the primary goal is to be attained. In this respect, a critical feature of contract law's pursuit of these three goals is its use of the nonenforcement sanction for specific contracts only. This limitation is a useful one for contract law, but it does restrict the kinds of social policy that contract can effectively support.

Conventionally, one of the major goals of contract law is the support of private markets.¹⁴¹ This preference for private market activity has two justifications. First, it is justified by political and social norms of limited government and relatively unrestricted individual freedom of activity. "[T]he balance of power essential to a democratically organized society cannot be maintained without a considerable measure of freedom in the economic sphere as well as in others."¹⁴² Second, private market activity is thought to be the best way to organize most of the society's economic activity to achieve the best allocation and most efficient use of resources in supplying material needs and wants. Exceptions have been made to slavish devotion to these political and social ideals, and to economic efficiency, when there have been good reasons to do so. For example, labor relations and the sale of corporate securities are subject to substantial

141. See, e.g., J. HURST, *LAW AND THE SOCIAL ORDER IN THE UNITED STATES* 231 (1977); Kessler & Sharp, *Contract as a Principle of Order*, reprinted in R. SCHWARTS & J. SKOLNICK, *SOCIETY AND THE REGAL ORDER* 155 (1970). Macneil describes contract as the "primary economic building block of the modern capitalist society." Macneil, *Essays on the Nature of Contract*, 10 N.C. CENT. L.J. 159, 198 (1979). The concern expressed below is that his theories of contract law may not adequately shape and cement these blocks.

142. H. HAVIGHURST, *supra* note 140, at 98-99. See also J. HURST, *supra* note 141, at 266. For a summary of conventional justifications for this individualism ideal, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-17 (1976). But see P. AREEDA & D. TURNER, *ANTITRUST LAW* 22-23 (1978) (questioning the connection between political democracy and economic decentralization). This justification, however, is broader than simple economic decentralization.

regulation, in one case to regulate in pursuit of industrial peace and to improve the lot of the wage earner, and in the other to prevent fraud and improper advantage-taking. Yet, these exceptions are contrary to the general premises.¹⁴³

There are two necessary conditions for the existence and operation of private markets. First, pursuit of private initiative must be permitted. Second, proper exercise of this private initiative must be rewarded with private profits, and improper exercise must be punished by private losses. In view of the government regulation of many economic entities and operations in our society, it may be argued that private markets no longer exist. While it is true that completely private markets, subject to no public scrutiny, are rare, private initiative and private profits and losses do continue to be the primary allocators of goods and services in the present economic system in the United States. In this sense, we have private markets that need the support of contract law.

Further, the individualistic ideals and precise formal rules of conventional contract law make it a good vehicle to provide such protection. Such ideals and rules promote private transactions and are, within the context of general state involvement, relatively non-interventionist.¹⁴⁴ In addition, they comport with the values of self-reliance and private acceptance of the consequences of private action.¹⁴⁵ The primary sanction that conventional contract law imposes in support of private markets is an

143. The legal arguments that justify an ideal are not independent from the political, moral, and economic ones. See Kennedy, *supra* note 142, at 1722. For a short discussion of why a group of ideas becomes the prevailing ideology, see G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 133-35 (1978).

For a short discussion of the idea that contract law is to be treated as a residuary, and other bodies of law are spun off from it as more affirmative regulation and sanction are needed, see Milhollin, *supra* note 17, at 50-51.

The common law, particularly the early common law, was not always favorably disposed toward individualism supported by public enforcement of private contract. See generally G. WHITE, *supra* at 19-24.

144. See Kennedy, *supra* note 142, at 1740-51. A system of affirmative regulation of some particular economic activity assumes some exercise of private initiative. For example, if private parties did not wish to enter into securities transactions, there would be no market on which securities regulation could operate. But the system of regulation must direct and limit the exercise of private initiative if it is to achieve its affirmative regulatory goal. Contract law should be wary of this direction and limitation if it is to support the operation of private markets.

145. *Id.* at 1737-40.

award of compensatory damages.¹⁴⁶ In sum, the precise formal rules and individualistic ideals of contract law are considered to support private markets by stimulating private activity, rewarding proper private initiative and punishing improper initiative, and reducing the legal uncertainty that faces bargaining parties. As long as this society's economic system depends primarily on private initiative for allocation of most goods and services, any substantial change in this fundamental legal support should be carefully considered.

Yet, it can be argued that contract law does not serve as an essential support to private markets because most contracting parties do not plan transactions or resolve disputes with reference to that law.¹⁴⁷ As discussed above, some contracting parties do plan transactions and resolve disputes with reference to contract law; it is important to preserve this safe harbor for those who choose to use it. Further, contract law has been considered as a partial, indirect moral guide to contracting parties and to society generally.¹⁴⁸ To the extent that it supports private markets, it is one implicit legitimizing force for those markets. Finally, contract law must provide criteria for resolution of the commercially atypical dispute that will find its way to the law. If market support criteria are not used to resolve this kind of dispute, there is potential for destabilization of markets beyond the realm of present dispute resolution.

The goal of supporting private markets, however, should not be all pervasive nor unqualified. When the reasons for supporting private markets do not apply, pursuit of additional, and even potentially conflicting, goals will be necessary. Support of private markets and their theoretically efficient results assumes a given distribution of wealth in the society. If one of the social goals being pursued is alteration of the distribution of wealth in a more egalitarian direction, support of private markets may be relatively less important.¹⁴⁹ In theory, private markets give eco-

146. *Id.* at 1743. See note 4 *supra*. Recent commentators have noted the tendency to award punitive damages in cases of extreme breach of contract. For contract law to pursue its market support function most effectively, limits on the cases granting such awards need to be articulated.

147. This conclusion rests on the empirical work discussed in Section II.B. *supra*.

148. See, e.g., Llewellyn, *Why We Need the Uniform Commercial Code*, 10 FLA. L. REV. 367 (1957).

149. See C. JACOBS, *LAW WRITERS AND THE COURTS* 93-97 (1954); J. HURST, *supra*

nomically efficient results when all parties exchanging in them have perfect knowledge, rationality, and foresight. When these conditions are not approximated, efficiency may not result from private markets, and goals other than market support should again assume relatively more importance.¹⁵⁰ Finally, the other goals of contract law serve to limit the power that contract law permits contracting parties to exercise.¹⁵¹

The second major goal of contract law is to discourage certain bargaining process conduct by denying enforcement to the resulting agreements. It seems plausible that some restrictions on the pursuit of purely short-term self-interest in the bargaining process will be necessary to make the process work.¹⁵² Thus, agreements based upon fraud, misrepresentation, overreaching, and similar improper bargaining conduct are not enforced. Traditionally, this policing of the bargaining process has remained within the broad framework of reasonably precise formal rules found in other parts of contract law. More recently, the policing has taken the form of affirmatively protecting broad classes of contracting parties, such as the poor or consumers. As will be discussed below, such policing must be subject to limits or it can lead naturally into the kind of affirmative regulation, with more

note 141, at 266; Kennedy, *supra* note 142, at 1762. For a treatment of the idea that contract law may not be a good vehicle for such redistribution, see Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

150. Kennedy, *supra* note 136, at 1753 (discussing goals other than market support goals generally).

Economics has termed this situation "market failure." Market failure results when, for some reason, a market for a scarce economic good either will not exist or, if it does exist, will not give efficient results. See generally Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market v. Nonmarket Allocation*, in ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM, 47-64 (Joint Economic Committee 1966); Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971). Market failure is frequently treated as a problem of imperfect information. For a perceptive recent discussion of market failure as a claimed justification for government intervention, see Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 PA. L. REV. 630 (1979).

151. Holmes develops the idea that good faith, expanded liability, and more flexible remedies do not signal the death of classical contract, only its limitations. Holmes, *supra* note 45. See notes 154-56, *infra*.

152. See, e.g., Kennedy, *supra* note 142, at 1713. It can be argued that these restrictions promote economic efficiency by making exchange more likely to be value maximizing. See generally A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* 67-113 (1979).

affirmative sanctions, that contract law is ill-equipped to provide¹⁵³ and that may conflict with the market support goals.

The third major goal of contract law also has potential points of conflict with the first. Contract law attempts to provide limited advancement to certain social results considered to be good; it does so by denying enforcement to some contracts. These rules break down into two groups. First, enforcement may be denied because the type of contract is against public policy—contracts to commit a crime and contracts to pay gambling debts in most states are good examples. Second, enforcement is sometimes denied the contracts of certain groups of contractors; the groups are typically well defined within narrow limits by either their probable small size (incompetents) or an easily ascertainable characteristic (age). For each group, the primary sanction available is typically nonenforcement, although compensation for partial performance is also available frequently. While this goal is potentially in conflict with the goal of protection of private markets, the limited and reasonably well-defined contracts and groups to which it applies will minimize the number of situations of actual conflict.

The fourth major objective has a potentially greater conflict with the support of private market goals. Contract law frequently and increasingly limits the use of contract to exercise social, political, or economic power against certain broad categories of contracting parties. This limitation is designed to redistribute wealth from powerful entities to protected groups. The groups protected under this goal are typically large, diverse, and open-ended. For example, unconscionability is used to protect the poor and the consumer;¹⁵⁴ Federal Trade Commission rules have been proposed to protect used car buyers¹⁵⁵ and all buyers of consumer products.¹⁵⁶ When conventional contract law is the

153. For a discussion of the general contradiction between individualistic and altruistic ideals, see Kennedy, *supra* note 142, at 1731-35.

154. U.C.C. § 2-302. Kessler & Sharp, *supra* note 135 (discussing the potential conflict in contract law rules).

155. For a brief discussion of the proposed Federal Trade Commission rules to protect used car buyers, see [1978] ANTITRUST & TRADE REG. REP. (BNA) 867, § A-1.

156. See generally Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, 15 U.S.C. §§ 2301-2312 (Supp. 1979), and rules adopted thereunder. Macneil develops the idea of limits to the exercise of power through contract. Macneil, *Essays on the Nature of Contract*, 10 N.C. CENT. L.J. 159, 192-200 (1979).

vehicle, broad standards are typically used; they are then given specific meaning only in the context of the particular facts of the dispute.¹⁵⁷ In this situation, there is typically a sense of the limits of applicability of the standards, even if the limits are unexpressed.¹⁵⁸ Without such limits, private markets would be less likely to respond to the needs and desires of the protected groups. When more affirmative regulation, with more affirmative sanctions than mere compensatory damages or nonenforcement, is desired, it is usually necessary to create a body of detailed rules with explicit, more affirmative sanctions.¹⁵⁹ Yet, the use of a more active sanction will tend to discourage private initiative and undercut the contract law support for private markets. Thus, it is fortunate that most of this protection has come in the form of spinning off new bodies of law, rather than rewriting all of conventional contract law. When the redistribution and protection is undertaken by modifying traditional contract law, the limits of such modification need to be established, either overtly or covertly, to limit the conflict with private market support.¹⁶⁰

Pursuit of this goal need not entirely conflict with the contract law goal of supporting private markets. When such support is not justified because the necessary preconditions for socially beneficial operation of private markets are not met,¹⁶¹ the conflict of goals is more apparent than real. This protection is provided under the banner of limiting the exercise of power through contract; a real cost of such protection is restriction of the ten-

157. *E.g.*, U.C.C. § 2-302: This section authorizes the court to deny enforcement to "unconscionable" contracts and "unconscionable" contract terms.

Kennedy argues that use of more generalized standards as the form of substantive law rule is more likely where altruistic goals support the rule. Kennedy, *supra* note 142, at 1766-76.

158. *See, e.g.*, *Delta Airlines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965) (refusing to find unconscionable limitation of liability in a contract between two large commercial entities when the limitation had been a subject of genuine bargaining between the parties).

159. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1681t (1974 & Supp. 1979); Uniform Consumer Credit Code; various regulations dealing with consumer product safety.

160. Holmes does not discuss the problems of limits in this context, but he is most concerned with establishing that extra-contract damages should be awarded in first-party insurance cases only on the basis of the insurer's unreasonable conduct and not on a strict liability theory. Holmes, *supra* note 45, at 377-81.

161. *See* note 144 *supra*. For a discussion of the behavior of markets characterized by imperfect information, see Schwartz & Wilde, *supra* note 150, at 640-50.

dency of private markets to respond to the market-expressed preferences of the protected group.¹⁶² These costs should be evaluated appropriately in establishing protection. Certainly, the process of dynamic adjustment in pursuit of these conflicting and desirable goals is one of the major challenges facing contemporary contract law.

In summary, although conventional contract law is pursuing potentially conflicting goals, the conflict should prove manageable. The goal of protecting and facilitating the operation of private markets is paramount. Other goals, focusing on more distributional concerns, typically are pursued only to a limited extent by contract law. This pursuit of other goals establishes limits for the market support goal.¹⁶³ Further, the limitations tend to restrict pursuit of these other goals to contract situations in which the justifications for unqualified support of private markets are less compelling—such as consumer cases and cases involving sales to poor people. When greater regulation with more affirmative sanctions is sought, the general tendency has been and should be to spin off the area into a new body of law, rather than undercut the main body and thrust of market-support-oriented contract law.¹⁶⁴

162. Professor Leff has argued persuasively that such protection can in fact legally debilitate or incapacitate the protected group:

One can see it enshrined in the old English equity court's jolly treatment of English seamen as members of a happy, fun-loving race (with, one supposes, a fine sense of rhythm), but certainly not to be trusted to take care of themselves. What effect, if any, this had upon the sailors is hidden behind the judicial chuckles as they protected their sailor boys, but one cannot help wondering how many sailors manage to get credit at a reasonable price. In other words, the benevolent have a tendency to colonize, whether geographically or legally.

Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 PA. L. REV. 485, 556-58 (1967). See discussion in note 144, *supra*.

163. This conflict is not particularly surprising in any public policy. Kennedy, *supra* note 102, at 1774. See generally Kessler & Sharpe, *supra* note 141.

164. It has been noted above that there is something of a trend toward awarding punitive damages in cases involving egregious nonpayment of insurance policy benefits. See note 45 *supra*. The practice of imposing this more affirmative sanction must be kept within bounds if the market support goals of contract are to be pursued effectively. More affirmative sanctions than nonenforcement create disincentives for private action. See note 146 *supra*.

D. Macneil: Relational Dispute Resolution or Relational Exchange Regulation?

Arguably, Professor Macneil's relational theory of contract law, as presented above,¹⁶⁵ has not yet articulated the ultimate purposes or goals it would set for contract law, and it can reasonably be interpreted to support two different goals. A restricted reading of his theory advocates relational contract law aimed at dispute resolution only; this approach potentially could improve the substantive justice of dispute resolution without seriously undermining the market support goals of contract law. A broad reading views the relational theory as compatible with affirmative regulation of all exchange behavior; such an approach, it is submitted, would undermine seriously the market support goals of contract law. A discussion of these two alternative possibilities follows, after a brief review of the expanded scope of contract law implicit in the relational theory.

Professor Macneil first would broaden the scope of contract law from the traditional limitation of promises about specific future transactions into concern for all aspects of exchange relationships. He would cease "to equate exchange with discrete transactions and contract with promise."¹⁶⁶ But present law does not purport to govern all exchange, only exchange based on promises. It presumes that, if the parties wish to have access to legal enforcement and legal remedies, their transaction must be cast in the exchange mold recognized by contract law. Professor Macneil proposes to change this rule by formulating law which governs all exchange relations (although presumably coverage could be avoided by specifying such an exclusion in the contract).¹⁶⁷ The threshold determination by contract law would not be whether promises were made that related to an exchange transaction, but whether exchange relations existed and, if so, the legal consequences flowing from them.¹⁶⁸ Thus, the reason-

165. See Section III.B. *supra*.

166. Macneil, *supra* note 2, at 696.

167. See *id.* at 805-15.

168. In a recent work, Professor Macneil assumes that any kind of contract or relationship makes a resulting exchange relational; thus, the parties' relationship can be extra-exchange and still make the exchange a relational one. Macneil, *Contracts: Adjustment of Long Term Economic Relations Under Classical, Neo-Classical and Relational Contract Law*, 72 Nw. L. Rev. 854, 856-59 (1978). Thus, the potential scope of relational rules may be very broad indeed.

ably clear line between legal consequences and no legal consequences would become blurred—more so than by the present doctrines of promissory estoppel and quasi-contract.

The effect of this broadened scope of application of contract law will be determined primarily by the ultimate purpose the body of law is to pursue. This broadened scope has potential to improve the ability of contract law to articulate market policy by bringing more types of market conduct within the scope of contract law. Yet, there are two problems with this extension. First, there would be substantial weakening of a party's ability to avoid contract-law implications of given conduct—what the late Professor Edwin W. Patterson referred to as “freedom from contract.”¹⁶⁹ This problem is exacerbated by the emotive power of the label “contract.” Second, there is some question whether this doctrinal extension actually will encompass many more cases. For purposes of analysis, parties who are preparing to enter into an exchange can be divided into two groups—those who wish to plan for legal effect and those who do not. Professor Macneil's new system of contract law would not add meaningfully to the law's support of those who wish to plan for future legal effect; they may plan under present law and this planning will be enforced by the courts.¹⁷⁰ Yet, most commercial contracting parties do not choose to plan for future legal effect. When these nonplanning parties have a strong exchange relationship, usually resulting from extended, regularized transactions in the past, modern empirical research indicates that most will neither bring most of their disputes to the courts nor refer to contract law when settling among themselves.¹⁷¹ Thus, expanding the scope of contract law will be of little significance to these parties. When these nonplanning parties do not have an exchange relationship, a new set of relational contract rules will likely not reach resolution of their dispute if they do bring it to court, even though they are more likely to do so. Thus, a new set of relational rules will have a substantial impact on dispute reso-

169. See, e.g., Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 732 (1943). See generally Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

170. One qualification to this statement should be noted. Under Professor Macneil's relational system, parties would likely have an enhanced ability to plan for a future exchange relationship rather than for future exchange transactions.

171. See text accompanying notes 76-102 *supra*.

lution only in those cases in which three circumstances coincide: when the parties do not plan for future legal effect; when they have an exchange relationship; and when this relationship is not sufficiently well-established to provide a basis for dispute resolution. While it is not unreasonable to expect these first two circumstances to exist with some regularity, the third seems an open question.

A narrow reading of Professor Macneil's relational theory would advocate its use only for the purpose of improving dispute resolution. Such use is needed, as argued above, because relational factors do affect the substance of exchange and should be considered in resolving disputes arising from exchange.¹⁷² This limited purpose of a relational theory finds support in Professor Macneil's works. He has observed that dispute resolution mechanisms are essentially conservative, seeking primarily to preserve the exchange relationship.¹⁷³ In addition, he has previously stated that his relational theory is designed to supplement traditional law rather than to replace it.¹⁷⁴ Presumably, a relational theory aimed at dispute resolution would continue the sanction of nonenforcement of contract.

There are two primary advantages to a dispute-resolution-oriented relational system over our present transactional system. First, such a system should improve the quality of dispute resolution. The court would get a clearer picture of the facts and

172. Macneil, *supra* note 2, at 805-11. It has been observed that the present system of contract law may in fact interfere with commercial contracting behavior by introducing an implicit threat to litigate, which destroys the trust and cooperation necessary in relationships, McCauley, *supra* note 24, at 816, by requiring planning for dispute resolution, which may be disruptive, Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 676 (1975), and by causing students (and by implication all those who work with the system) to see contract relations as extrapolations of legal doctrines, rather than viewing legal doctrines as properly responsive to contracting problems. Macneil, *Whither Contracts?*, *supra* note 103, at 416. Professor Reitz concludes that

because of the doctrinal emphasis on noncontractual matters, it is very hard to place a given set of contract issues in an analytic frame of reference that shows the proper role of market-based bargains in our 20th century economic system. We struggle with the old and new devices for policing contracts, for example, but we act without any solid foundation for such policy analysis. For that absence, the classical general theory of contracts is largely to blame.

Reitz, *supra* note 50, at 700.

173. See Macneil, *supra* note 168, at 895-98.

174. Macneil, *supra* note 2, at 693. Macneil, however, has also argued that the present contract-law system should be viewed as only part of a larger exchange system. Macneil, *supra* note 168, at 887-89.

importance of the parties' exchange relation by focusing on the relation directly. At present, this information must be smuggled into court through the back door of proving a fictitious or implicit assent.¹⁷⁵ Second, such a system would enhance the abilities of parties to plan for future exchanges by giving an enhanced legal status to their planned relationship as the vehicle for that exchange.¹⁷⁶

There is, however, one potential problem with such a relational approach. As relational rules are developed, the law would begin to make certain legal obligations customary incidents of a particular exchange relationship. Difficulties arise if parties in such an exchange relationship choose to vary those obligations by express or implied agreement. The problem is whether the law will recognize the parties' own obligations or impose on them the customary ones. If parties are allowed to plan private market transactions, then the obligations they have given themselves should prevail. The solution would be to recognize the parties' agreed obligations as the prevailing characteristic of the exchange relation. Indeed, Professor Macneil's recent work appears to authorize this result.¹⁷⁷ In addition, the idea of enforcing the planning of parties, which runs throughout his work, would support the correct result. The opposite rule would seriously undermine the ability of contract law to support private markets.

In summary, relational rules in pursuit of the goal of dispute resolution can improve that process without seriously undermining support for private markets. In addition, such rules should improve contract law's ability to regulate certain types of bargaining-process conduct by broadening the focus to consider explicitly all exchange-related conduct. They can also improve advancement of the distributional goals of contract by considering aspects of the exchange relation concerned with the parties' respective wealth positions. Like traditional contract law, a relational approach must establish limits on the pursuit of these dis-

175. See Macneil, *Presentation*, *supra* note 103.

176. For a discussion of the difficulty of accomplishing such planning in a transaction-oriented system, see Macneil, *supra* note 168, at 859-76. See generally *id.* at 889-95; Macneil, *supra* note 2, at 712-20.

177. Macneil notes that a particular exchange relation may make the transactional values of discreteness and presentation relatively more important. Macneil, *supra* note 168, at 885-89.

tributional goals to avoid eroding support of private markets. Also like traditional contract law, a relational approach must limit itself primarily to the sanctions of compensatory damages or nonenforcement to avoid dampening private initiative.

A relational rule aimed at dispute resolution, however, will not be sufficient to serve as the intellectual conduit to reunify bodies of law previously spun off from contract, one of the objectives of Macneil's relational theory.¹⁷⁸ These bodies of law, such as corporations and securities, are pursuing more active goals and, hence, require more affirmative sanctions.¹⁷⁹ Yet, contract law that adopts affirmative sanctions as its primary regulatory tool will seriously undercut its capacity to support private markets.

In contrast with the restricted relational theory discussed above, a broad relational system would have to regulate all exchange relations. For such regulation to take place through the machinery of dispute resolution, most of the significant disputes must be brought to the regulatory system, or the system must reach out and actively bring them in.¹⁸⁰ Yet, the empiricists have demonstrated that most significant commercial disputes are not now brought into the system. Thus, either a comprehensive system of regulation will be required, or the dispute resolution system must be changed to cause most disputes to be brought to it.

The prospects are not good for changing dispute resolution to entice parties in mainstream commercial disputes to use it. These parties make decisions by comparing the costs of the legal action, both monetary and nonmonetary, and the benefits to be gained from it; presumably they are finding presently that the costs of using courts to resolve most commercial disputes outweigh the benefits. The costs of legal action in this situation may be grouped into four categories.¹⁸¹ First is the monetary expenditure to pay for lawyers, court costs, and other litigating expenses. Second is the disruption of internal business operations

178. See Macneil, *supra* note 2, at 814-15.

179. Indeed, the need for more affirmative sanctions is one of the primary reasons that these bodies of law were spun off. For a survey of the extent to which the more affirmative sanction of punitive damages is being used in some contract cases today, see note 45 and accompanying text *supra*.

180. See Milhollin, *supra* note 17, at 50-51.

181. For a more extensive discussion and citation of authorities, see text accompanying notes 78-80 *supra*.

by taking employees, particularly high level ones, away from their jobs. Third is disruption of the immediate commercial relationship with the other party. Interference with commercial relationships is a substantial cost of litigation because preservation of commercial relationships is important to most business parties. Last is the indirect interference with present and future business relationships by giving the party resorting to litigation a bad reputation as one who prefers litigating—others may become less desirous of its business. Against these costs can be weighed two benefits. First, the monetary recovery and other relief which may be ordered. This potential benefit, however, must be discounted by the probability that the party may not be successful. While very little empirical research has been done, it is generally felt that contract damages awards are too low to afford realistic compensation.¹⁸² A second possible benefit is establishing a credible threat to deter future improper business conduct.

One way to change the weighing of costs and benefits is to increase damage awards. This would bring more contract disputes to court only if, overall, benefits would outweigh the costs. Yet, the internal disruption of business and the interference with business relationships are likely to be the most important costs for commercial parties in significant disputes. At present, it is difficult, if not impossible, to say how much damage awards would have to be increased to outweigh these costs. If Professor Macneil's relational rules make business parties more comfortable with litigation and its results, they may lower these commercial relationship disruption costs. Given the adversary nature of our courts' dispute resolution process, such a result appears unlikely. Certainly this question should be dealt with before a system of relational rules is adopted. The most likely result is that a comprehensive system of supervision and regulation would be necessary to bring to the courts most commercially significant disputes and make relational rules the effective commercial standards of most commercial parties.¹⁸³ Professor Macneil nowhere advocates such supervision and regulation; however, a

182. See Mueller, *supra* note 79.

183. Without such regulation, mainstream commercial disputes presumably will continue to be settled out of court; with it, parties will have substantial difficulties avoiding the legal effect of their actions even when they wish to.

broad reading of his relational theory can support it.¹⁸⁴

In this type of regulatory system, the content and substance of private exchange presumably would be governed by public standards articulating the terms on which exchange in an exchange relationship would take place. In essence, the existence of an exchange relationship would call forth a set of terms determined to be good by public authorities. The net result could be a public, collectivist approach to the terms and substance of what is presently private exchange.¹⁸⁵ This conclusion is supported by the very broad definition of relations in the proposed system of relational rules¹⁸⁶ and by the fundamental notion that the relation itself "defines the content of the obligation."¹⁸⁷ Further support comes from the argument that Macneil's relational system can serve as a basis for reunifying areas of contract, such as labor law and corporations, which have been spun off from contract law. These areas of law establish affirmative systems of regulation that include more affirmative sanctions than traditional contract law. To join them under a grand theory of contract law would require adoption of the same sort of affirmative regulation and sanctions.

The vice of this system of contract law would be its failure to support private markets. As argued above, private markets demand private initiative in pursuit of private profits. Dispute resolution in support of such markets must enforce the private bargains brought to it, on the basis of private, individualistic de-

184. In this general context, Speidel states:

But the unanswered question in *The Death of Contract* is where the new imperatives should stop and "freedom from and freedom to" begin. This is, I believe, the jurisprudential question of our time. Although the conditions for the exercise of those freedoms in 1975 and 2075 will differ from those in 1880, what they are and why they are imposed must constantly be identified and tested.

Speidel, *supra* note 49, at 1182.

185. Macneil describes his approach as "collectivist." The ideal of the body of contract law would shift from a primarily individualistic approach to a primarily altruistic approach. Macneil, *supra* note 2, at 735. It must be stressed that Professor Macneil does not advocate such a course; however, this broad reading of his relational theory is compatible with it. For background and review of traditional justifications, see Kennedy, *supra* note 142, at 1735, 1737-40, 1753-60. For historical context, see J. HURST, *supra* note 141, at 266, C. JACOBS, *supra* note 149, at 23-27; G. WHITE, *supra* note 143, at 48-61, 133-35.

186. See Macneil, *supra* note 168, at 887-89.

187. Macneil, *supra* note 2, at 786.

terminations of profit and loss, unless enforcement is denied for a limited, previously articulated reason. Otherwise, private initiative will not be forthcoming. Yet, a system of affirmative regulation and affirmative sanctions would have difficulty granting enforcement on the basis of a private determination of profit and loss.¹⁸⁸ Indeed, the idea of affirmative regulation calls for standards and terms of exchange which look to a public calculus of profit and loss.

Two other fundamental problems exist with a broad relational theory. To the extent that contract law serves as a moral guide to contracting parties, affirmative regulation of exchange relations would undercut the legitimacy of private initiative in pursuit of private profits. This would seriously weaken the law's support for private markets. Second, this system would be totally unresponsive to the need for freedom from contract. To avoid involvement with contract law, one would have to avoid any involvement with exchange relations.

This maximum relational theory would improve the ability of contract law to regulate the bargaining process by raising the cost of improper conduct and, potentially, by removing the limits to this regulation.¹⁸⁹ It also would make contract law's theoretical ability to advance its distributional goals almost limitless by, again, raising the costs of undesirable activities and removing the limits to pursuit of these results. For the reasons set forth above, however, this ability could have substantial effect on contract law's ability to support private markets.

V. CONCLUSION

Contract law exists to advance several diverse goals and tolerates this diversity by placing limits on the extent to which

188. *Contra* Kennedy, *supra* note 142, at 1717-22, 1745. Professor Macneil is aware of the importance of private contract to the operation of a modern capitalist society and is concerned that contract law support this operation. Macneil, *Essays on the Nature of Contract*, 10 N.C. CENT. L.J. 159, 198-200 (1979). My concern is that other aspects of his theories may not adequately provide this support.

189. Macneil, *Essays on the Nature of Contract*, 10 N.C. CENT. L.J. 159, 180-93 (1979). Macneil has expressed the view that just as contract must support private markets, contract must be taught its limits. *Id.* These limits will come from the other goals of contract law. As argued above, however, there also must be limits on the pursuit of these other goals. The concern here is that a broad reading of the relational theory does not provide such limits.

they will be pursued.¹⁹⁰ Chief among these goals is the protection and promotion of private markets. The future contract law which Professor Gilmore sees emerging after contract's *Death* has a scope and purpose compatible with those of traditional contract law. With Professor Macneil's "Many Futures" of contract law, one cannot tell. A narrow reading of his relational theory is largely consistent with the traditional purpose of contract law. Contract law based on such a narrow reading can serve to advance the protection and promotion of private markets. There is a serious concern, however, that a broad reading of his relational theory is compatible with more affirmative regulation that would seriously undermine private markets. While private markets are not sacrosanct, we should not abandon them without a clear view of how goods and services will be allocated without them. In addition, we need a clear evaluation of the effect of this change on the prevailing political, social, and economic norms related to these markets. The ultimate purposes of contract law to be pursued and the nature of sanctions used to pursue these purposes are questions of critical import in determining what relational theory is proposed and whether it should be adopted.

190. See, e.g., Kennedy, *supra* note 142, at 1774.